

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 20**

**FIRST TRANSIT STANFORD**

**Employer**

**and**

**Case 20-RC-265327**

**TEAMSTERS LOCAL 853**

**Petitioner**

**REGIONAL DIRECTOR'S DECISION ON OBJECTIONS AND  
CERTIFICATION OF REPRESENTATIVE**

Pursuant to a Stipulated Election Agreement, an election was conducted by mail ballot, with ballots being mailed from the Regional Office to eligible voters on Wednesday, September 16, 2020<sup>1</sup>, in a unit of the Employer's Dispatchers, Road Supervisors, and Safety Trainers. The Tally of Ballots that issued on October 9 shows that, of approximately 12 eligible voters, 6 voted for Teamsters Local 853 (Petitioner) and 2 voted against representation, with 3 void ballots and no challenged ballots. Therefore, Petitioner received a majority of the valid votes cast.

On October 15, the Employer timely filed Objections to Conduct of the Election (Objections) and timely submitted an offer of proof in support thereof. A copy of the Objections is attached to this Order as **Attachment A**.<sup>2</sup> Three of the Objections encompass a single allegation that the Region mishandled the ballot count and therefore compromised the integrity of the election. The fourth and final Objection alleges that the Petitioner interfered with the election by providing one voter with a "copy" ballot.

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<sup>1</sup> All dates herein are calendar year 2020.

<sup>2</sup> Only conduct which occurred during the "critical period" (between the August 27 filing date of the petition and through the election) can form the basis for objectionable conduct in mail-ballot elections. *Goodyear Tire and Rubber Co.* 138 NLRB 453 (1962). All of the conduct encompassed by the subject Objections allegedly occurred during the critical period.

Pursuant to Section 102.69(c)(1)(i) of the Board's Rules, I have considered the Objections and the Employer's offer of proof, and as discussed below, I am overruling the Objections and issuing a Certification of Representative.

**I. BACKGROUND FACTS and the ADMINISTRATIVE INVESTIGATION**

The Region timely sent a mail-ballot kit to every voter on the voter list, and the administrative investigation disclosed that the Region did not misplace or otherwise fail to count any ballots it timely received in this election. As discussed more fully below, and as the voter list reflects, the Region mailed two voters a duplicate ballot in accordance with Board policy.<sup>3</sup> One of those voters timely returned both ballots. The second voter never returned his original ballot, but belatedly returned his duplicate ballot after the ballot count. Consequently, that ballot was not counted.

The mail-ballot count in this case was conducted on October 9 by video conference. Serving as observers for the Petitioner and Employer, respectively, were Petitioner Representative Stacey Murphy and Sr. Director Field Human Resources & Labor Relations Kim Mingo. At the start of the ballot count, the Board agent announced that 11 mail ballots had been returned out of approximately 12 eligible voters, but that only 10 would be counted because one voter returned two ballots. She then proceeded to check the outer return envelopes against the voter list. In each instance, she showed both observers the signature on the return envelope and awaited their approval before clearing the ballot and opening the outer return envelope. As is usually the case in mail-ballot elections, many of the required signatures on the return envelopes were illegible. Accordingly, the Board agent checked the key number that was assigned to each name on the voter list against the key number on the outer return envelope.<sup>4</sup>

While the Board agent was clearing the outer return envelopes, she noted again for the parties that one voter returned two ballots. She showed the parties that the first envelope returned by

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<sup>3</sup> A redacted copy of the voter list used in this election is attached as **Attachment B**.

<sup>4</sup> Each outer yellow envelope also contained the case number, but this detail was overlooked by the Board agent and the parties at this point.

that voter bore no signature.<sup>5</sup> The Board agent then explained that the Region sent the subject voter a duplicate ballot kit with a letter explaining that a failure to sign the return envelope voids the ballot. The Board agent informed the parties that the ballot in the unsigned return envelope was void and that she would open and count only the ballot inside the signed return envelope.

After all of the outer return envelopes were checked against the list and cleared, the Board agent then proceeded to open all of the outer return envelopes at once. Once those were opened, the Board agent extracted and co-mingled all of the inner ballot envelopes. One by one, the Board agent pulled out each inner envelope from the bag, opened it, and removed the ballot. The designated color of the ballot for this election was pink, but two of the inner envelopes contained blue ballots that belonged to another, unrelated election.

The Board agent reviewed the cleared outer return envelopes and discerned that two of the envelopes were marked with a different case number. The signatures on both return envelopes were illegible, and the agent and parties had earlier used the key numbers to clear the envelopes and check off those voters. The key numbers had matching corresponding numbers on the voter list and there was no indication (other than the case number) that those two return envelopes were from another election. After confirming with the parties that the two blue ballots were, indeed, from another election, the Board agent then voided both ballots (bringing the total of void ballots to three) and proceeded to count the eight valid pink ballots that were cast in this election.

Given the irregularity in this case, I directed an administrative investigation into the Region's handling and count of the returned ballots in this case and in other cases to determine whether this occurrence was, in fact, an isolated incident. Because all but two of the Region's employees have been working from home consistently since March due to the ongoing pandemic, the only two Board agents who handled the mailing and receipt of ballots at all relevant times herein were the Region's office manager and the election clerk. Those two agents confirmed that, in keeping with internal protocol, all mail ballots received at the Regional Office were immediately stored

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<sup>5</sup> As part of its offer of proof, the Employer asserts that Mingo would testify that Petitioner Representative Murphy stated that there was a voter who claimed to have not received a ballot and so a "copy" ballot was provided to the voter. The asserted implication is that Petitioner made a copy of a ballot and gave it to the voter. However, there is no proffered evidence that any such copying and distribution actually occurred.

in the election clerk's designated office drawer. Neither of the two agents recalled placing the two subject return envelopes for another election in the case file for this election, but they acknowledged that one or both of them must have inadvertently done so. Out of an abundance of caution and diligence, the election clerk searched every desk drawer and file in the election clerk office. She did not discover any misplaced ballots in this election or in any other election.

Additionally, the Board agent who conducted the ballot count in the other election in which the ballots were blue reported that there were no misplaced ballots in his election. All told, the investigation disclosed that no ballots from this election were mixed in with ballots in any other election, including the election for which the blue ballots were intended.<sup>6</sup>

In sum, the Region confirmed that in this case, the two blue ballots from another election with key numbers 2 and 10 were mistakenly placed in the case file for this election. Unfortunately, the ballots in this election with those same key numbers were never returned to the Regional Office. Had those ballots been received, the duplicative key numbers would have alerted the Board agents to the issue before the count.

## **II. THE OBJECTIONS and ANALYSIS**

### **Board Standards for Setting Aside Elections and for Evaluating Offers of Proof**

"Representation elections are not lightly set aside" and "[t]here is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (citations omitted). The objecting party bears the "entire burden" of showing evidence that misconduct warrants overturning the election. *Id.* at 328. The burden of proof is on the party seeking to set aside a Board-supervised election, and that burden is a "heavy one." *Lalique N.A., Inc.*, 339 NLRB 1119, 1122 (2003); *Chicago Metallic Corp.*, 273 NLRB 1677, 1704 fn. 163 (1985). The objecting party's burden encompasses every aspect of a *prima facie* case. *Sanitas Service Corp.*, 272 NLRB 119, 120 (1984).

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<sup>6</sup> The two void blue ballots discovered in this election were not sufficient in number to affect the results of the election in the other case.

The goal of the Board's election procedure is to establish "those safeguards of accuracy and security thought to be optimal in typical election situations." *Guardsmark, LLC*, 363 NLRB No. 103 (2016); citing *Polymers, Inc.*, 174 NLRB 282 (1969), enf'd. 414 F.2d 999 (2d Cir. 1969), cert. denied 396 U.S. 1010 (1970). The Board acknowledges both that "strict compliance with its election procedures does not guarantee the validity of an election," and that "deviation from these procedures does not necessarily require setting aside an election." *Id.*; citing *Affiliated Computer Services*, 355 NLRB 899, 909 (2010). There is no "per se rule that ... elections must be set aside following any procedural irregularity." *St. Vincent Hospital, LLC*, 344 NLRB 586, 587 (2005) (quoting *Rochester Joint Board v. NLRB*, 896 F.2d 24, 27 (2d Cir.1990)). The test for setting aside an election based on regional office conduct is whether the alleged irregularity raised "a reasonable doubt as to the fairness and validity of the election." *Polymers, Inc.*, supra at 282; see also *Physicians & Surgeons Ambulance Service, Inc.*, 356 NLRB No. 42, slip op at 1 (2010), enf'd. 477 Fed.Appx.743 (D.C. Cir. 2012). The objecting party's showing of prejudicial harm must be more than speculative to establish that a new election is required. See e.g., *Transportation Unlimited, Inc.*, 312 NLRB 1162 (1993), and cases cited therein.

#### Objection 4

With regard to the Employer's Objection concerning one voter reportedly receiving a "copy" ballot, the offer of proof is limited to the Petitioner's observer (Murphy) reportedly stating at the ballot count that one voter received a "copy" ballot. However, the only conclusion that can be drawn from this bare offer of proof is that there is a misunderstanding of the mail-ballot election process. Section 11336.4 of the Board's Casehandling Manual, Part Two-Representation Proceedings, sets forth the circumstances and procedures for the Region to mail duplicate ballots to voters who do not sign the return envelope and to those who call and request another ballot due to spoilage, loss, or nonreceipt. Those procedures were followed in this election with respect to two voters; one who failed to sign the return envelope, and another who requested that a duplicate ballot be sent due to asserted nonreceipt.

It is uncontroverted that one voter cast two ballots in this election as a result of the voter's initial failure to sign the outer return envelope. Both ballots were returned to the Region

in the Agency-issued inner blue envelope and yellow outer envelope and matched the Region's internal key-code numbering system, described above. While Petitioner Representative Murphy allegedly stated that there was one voter who claimed to not have received a ballot and so a "copy" ballot was provided to the voter, there is no evidence that the Petitioner provided a "copy" of a ballot to any voter. Rather, it appears that Murphy was referring to the second voter to whom the Region sent a duplicate ballot at the voter's request. Whatever the reference, the Region's records reflect that duplicate ballots were sent to two voters, but only one of those ballots was returned timely for the count. On these facts, Murphy's vague reference to a "copy" ballot does not warrant a hearing, much less overturning the election results.

### Objections 1, 2 and 3

The remainder of the Employer's Objections are related and will be addressed together. Through these Objections, the Employer seeks to invalidate the election results on the asserted basis that the co-mingling of the two subject blue ballots from another case with the pink ballots in this election calls into question the fairness and validity of the election. The Employer did not proffer any evidence, but alternatively argues that the inadvertent co-mingling of the two subject blue ballots destroyed confidence in the whereabouts of the approximately four (now three)<sup>7</sup> ballots that were not received in the Regional Office. Essentially, the Employer contends without offering any proof that maybe the three ballots were cast, peradventure misplaced by the Region, and not counted. However, "to set aside an election based on Board agent misconduct, there must be *evidence* that 'raises a reasonable doubt as to the fairness and validity of the election.'"<sup>8</sup> *Emphasis added*. Thus, the Employer, as the objecting party, bears the "heavy" burden of proving that Board agent misconduct, in fact, occurred and that it "raises a reasonable doubt as to the fairness and validity of the election."

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<sup>7</sup> Voter #8 belatedly returned his duplicate ballot in this election. It was received in the Regional Office and date stamped on October 13- four days after the ballot count. A photocopy of that return envelope is attached hereto as **Attachment C**. The Employer was understandably unaware of the belatedly returned ballot when it filed its Objections. Hence, the reference to four ballots. Herein, I shall consider the three ballots that were not received in the Regional Office, since the fourth was returned after the ballot count.

<sup>8</sup> *American Medical Response*, 356 NLRB No. 42, slip op. at 1 (2010) (quoting *Polymers, Inc.*, 174 NLRB 282, 282 (1969), *enfd.* 414 F.2d 999 (2d Cir. 1969), *cert. denied* 396 U.S. 1010 (1970)).

In *Enloe Medical Center*, 345 NLRB 874 (2005), three elections were held simultaneously among three different units at a large hospital. In order to differentiate between units, voters were given one of three different colored ballots designated for their particular bargaining unit. There was one ballot box at each site, and all the ballots, regardless of unit, were placed in that ballot box. The employer argued that, since there was clear evidence that some voters, regardless of their unit, were inadvertently but erroneously given the wrong color ballots by Board agents conducting the election, it was likely that many other similar, but undetected errors were made that would have affected the outcome of the election. The Board disagreed and affirmed the ALJ's rejection of the employer's mere speculation that perhaps the Board agent "made other, more serious mistakes that were in fact material to the outcome of the election." *Id* at fn 18.

The Board's unpublished decision in *Kirkstall Road Enterprises, Inc.*, Case 2-RC-23547 (August 17, 2012), which involved almost identical objections to a mixed-mail, mixed-manual election, is also instructive. The employer in that case, unlike the Employer here, offered proof and argued that ten employees were disenfranchised either because they never received a mail ballot or because they mailed in ballots that were not counted. The region concluded that the offer of proof raised material issues of fact that warranted a hearing. However, the Board ultimately agreed with the ALJ-as-hearing-officer's recommendation to overrule the objections, but found it unnecessary to pass on his analysis and findings regarding whether the ten employees actually received and mailed their ballots to the regional office. Rather, the Board was satisfied that, like here, "[t]he Region sent a mail-ballot kit to every voter on the mail-ballot list, and there is no evidence that the Region misplaced or otherwise failed to count any ballots it received in this election." The Board went on to explain:

The Employer also introduced testimony from some voters whose ballots were not counted that they mailed their ballots to the Region. However, none of those individuals had his or her ballot returned as undeliverable, and none of those ballots ever turned up at the Regional Office—and the office was diligently searched. Such testimony, without more, fails to sustain the Employer's burden of proof to show that the Region misplaced or failed to count some mail ballots, or engaged in any other misconduct that affected the fairness and validity of the election.

In addition to the above, and akin to the case at bar, the Board considered that one mail ballot from another election was found among the ballots in the election under review. As here, that ballot was removed and was not counted. Also, like here, the Board noted that every ballot timely received was counted, and that a diligent search of the election clerk's office did not unearth a single misplaced mail-ballot envelope. Therefore, the Board found that the "transient misplacement of a single ballot was thus a harmless error that was resolved without any effect on the election." Moreover, the Board discounted the employer's argument that the region's misplacement of mail ballots in another election was the "tip" that proved the existence of an unseen "iceberg" of irregularities. *Id.*

Based on all of the above, I conclude that the two misplaced ballots from another election that were found in this election was harmless error that did not affect the election. It bears repeating that the Employer did not proffer any evidence whatsoever that the three uncounted ballots in this election were ever cast, much less that the Region received and misplaced them. Its conjecture that the Region *might* have received and misplaced those ballots is unfounded, and it offered no supporting proof. Such speculation is insufficient to raise material issues of fact that would warrant a hearing, much less to establish that the election was not fair and valid. Accordingly, the Employer has not met its "heavy burden" of overcoming the "strong presumption" that this Board-conducted elections was fair and valid and reflected the voters' desires. Accordingly, I overrule these Objections.

#### **IV. CONCLUSION**

Based on the above, I overrule the Objections in their entirety, and I shall certify the Petitioner as the exclusive collective-bargaining representative of the Employer's employees in the below appropriate bargaining unit.



### **III. CERTIFICATION OF REPRESENTATIVE**

**IT IS HEREBY CERTIFIED** that a majority of the valid ballots have been cast for Teamsters Local 853, and that it is the exclusive representative of all the employees in the following appropriate bargaining unit:

All full-time and regular part-time Dispatchers, Road Supervisors, and Safety Trainers employed by the Employer in or out of its facility located at 2415 Bay Road, Redwood City, California; excluding all other employees, guards, and statutory supervisors as defined by the Act.

### **IV. REQUEST FOR REVIEW**

Pursuant to Section 102.69(c)(2) of the Board's Rules and Regulations, any party may file with the Board in Washington, DC, a request for review of this decision. The request for review must conform to the requirements of Sections 102.67(e) and (i)(1) of the Board's Rules and must be received by the Board in Washington by December 7, 2020. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to [www.nlr.gov](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the Request for Review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Dated: November 23, 2020



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JILL H. COFFMAN  
REGIONAL DIRECTOR, REGION 20